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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1990

THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA,

Appellant

v.

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated, and ANDRE KEITH, et al., as Intervenor,

Appellees

ON APPEAL FROM A THREE-JUDGE PANEL OF THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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January 31, 1991

QUESTIONS PRESENTED

Whether Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, applies to changes in the internal governing structure of a state political party.

Whether the application of Section 5 of the Voting Rights Act to decisions about the internal structure of a political party contravenes the First Amendment to the Constitution of the United States.

Whether Section 5 of the Voting Rights Act applies to an affirmative action plan of a state political party by which blacks are appointed to the party's governing body after all other members of the governing body, black and white, are elected in the party's primary election.

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individually and on behalf of all other
persons similarly situated, and
ANDRE KEITH, et al., as Intervenor

Appellees

JURISDICTIONAL STATEMENT

Appellant, the State Democratic Executive Committee of Alabama (hereinafter "SDEC"), appeals from the final judgment of a three-judge panel of the Middle District of Alabama, duly constituted under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The Middle District of Alabama held that Section 5 of the Voting Rights Act applies to changes in an affirmative action plan for appointed positions on the executive body of a state political party.

OPINIONS BELOW

The order and dissent of the three-judge panel of the United States District Court for the Middle District of Alabama, entered August 20, 1990, reported as *Hawthorne v. Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990) (three-judge court), appears in the Appendix at A-1 to A-16.

The order of the three-judge panel of the United States District Court for the Middle District of Alabama, entered September 12, 1990, authorizing a one-judge court to carry out its order of August 12, 1990, appears in the Appendix at A-17.

The final order of the District Court on Appellant's Motion for Reconsideration, filed October 12, 1990 at the Request of the District Court, and entered December 21, 1990, which is not yet officially reported, appears in the Appendix at A-18 to A-24.

JURISDICTION

The United States District Court for the Middle District of Alabama entered an Order on August 20, 1990, finding that the "Drake II" rule of the State Democratic Executive Committee of Alabama was covered by Section 5 of the Voting Rights Act of 1965 and enjoining enforcement of the said rule until preclearance by the Justice Department. On October 11, the one-judge court of the Middle District of Alabama, authorized by the three-judge panel to carry out its August 20, 1990 order, requested of Appellant that it file a Motion for Reconsideration of the August 20, 1990 order in light of the Justice Department's preclearance of the Drake II rule on October 5, 1990. On December 21, 1990, the Middle District of Alabama issued an order on Appellant's Motion for Reconsideration.

The final order in the matter having been entered on December 21, 1990, a Notice of Appeal to this Court was duly filed in the United States District Court for the Middle District of Alabama on January 17, 1991, Appendix at A-25,[1] which date is within the 30 day period prescribed by 28 U.S.C. § 2101(b). This appeal is being docketed within 60 days of the filing of the Notice of Appeal as prescribed by the rules of this Court. Jurisdiction of this Court is invoked under 42 U.S.C. § 1973c.[2]

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[1]A Notice of Appeal was filed on September 7, 1990, Appendix at A-29, within 30 days of the three-judge panel's order of August 20, 1990. In light of the District Court's request that Appellant file a Motion for Reconsideration of the August 20, 1990 order, and upon advice of the Office of the Clerk of the U.S. Supreme Court, Appellant did not file a Jurisdictional Statement on the September Notice of Appeal. Rather, this Jurisdictional Statement shall serve to support both Notices of Appeal.

[2]This Court has held that the provision for direct appeal to the Supreme Court under 42 U.S.C. 1973c applies to Section 5 actions by private citizens in their local district courts. *Allen v. State Bd. of Elections*, 393 U.S. 544, 562-64 (1969).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the First Amendment to the United States Constitution and of the Voting Rights Act of 1965, as amended, are reproduced in the Appendix at A-33 to A-35.

STATEMENT

The Alabama Democratic Party (hereinafter the "Party") is governed by the State Democratic Executive Committee. Two hundred ten members of the SDEC, that is, one man and one woman from each of Alabama's one hundred five state house electoral districts, are elected to the SDEC in the Democratic Party primary. Since the mid-1970s, the Party has employed an affirmative action plan intended to increase minority representation on the SDEC. As initially adopted, the plan provided for the appointment of three blacks to the SDEC in addition to the elected members, such appointments to be made by the Alabama Democratic Conference (hereinafter "ADC'), an exclusively black political organization. In addition, the ADC chairman was automatically appointed the SDEC's Vice-Chairman for Minority Affairs.

In 1983, the affirmative action plan was expanded by a vote of the SDEC to increase the number of appointed seats allocated to the ADC from three to twenty-three. This change in the affirmative action plan, intended to ensure that black membership on the SDEC would reflect approximately Alabama's statewide black population percentage of 25.6%, was submitted to and precleared by the Justice Department.[3]

The Drake II amendment, initially passed January 13, 1990 and further revised, effects two changes in the affirmative action program.[4] First, it assures a percentage of African-Americans on the

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[3]See Letter of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to Mr. Albert W. LaPierre, Executive Director, SDEC, dated April 13, 1984. Appendix at A-36.

[4]Drake II was preceded by Drake I, which was adopted by the SDEC on April 15, 1989 and which provided for affirmative action appointments to be made by the SDEC (not the black caucus of the SDEC). On April 17, 1989, Appellees filed suit in the Middle District of Alabama challenging Drake I under Section 2 of the

SDEC equal to or higher than that targeted by the 1983 plan (hereinafter the "old rule") by providing that if necessary, after the SDEC is elected in the primary, blacks will be appointed to the SDEC to ensure that blacks will be represented at least in proportion to their population percentage *or* in proportion to the percentage of blacks voting in the Democratic primary, whichever is *greater*. Second, Drake II transfers the authority for selecting the individuals who will fill the affirmative action seats from the exclusive control of the ADC to the black members of the SDEC elected in the Democratic primary (the "black caucus"), including blacks affiliated with political organizations other than ADC, such as the Progressive Democratic Council, the Jefferson County Citizens Coalition, and the Alabama New South Coalition (ANSC),[5] as well as ADC members. A third provision of Drake II, that blacks desiring an appointed position on the SDEC must indicate their interest by qualifying to run in the Democratic primary (the "qualification requirement"), was withdrawn by the SDEC before the District Court's hearing of this matter both by its counsel's written correspondence with the District Court, as well as in its written and oral communications with the Voting Rights Section of the Justice Department.

Out of an abundance of caution and confident that Drake II would be found unproblematic, if covered at all,[6] the Party submitted Drake II to the Justice Department for preclearance on March 9, 1990; however, a response from the Attorney General was not received until October 5, 1990. Because the Party's primary was to be held on June 5, 1990, Appellees filed a motion for the convening of

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Voting Rights Act, 42 U.S.C. 1973, a challenge that was extended to Drake II upon its passage. The Section 2 case was tried in January of 1990, but no ruling on the merits has been issued in the case.

[5]The ADC and ANSC are competing black political organizations in Alabama. The impetus for Drake II came from ANSC to ensure that black representation on the SDEC fairly represented both organizations.

[6]See Letter of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to Mr. Albert W. LaPierre, Executive Director, SDEC, dated April 13, 1984, precleaning Appellant's earlier affirmative action plan and stating "[i]t is not at all clear that the internal party changes submitted are covered under Section 5 of the Voting Rights Act." Appendix at A-36.

a three-judge panel under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, seeking an injunction barring the Party from enforcing Drake II.

In response, Appellant argued that Drake II neither affected voting nor accomplished a public function of the Party and thus fell outside the purview of Section 5, obviating any basis for an injunction. Appellant also argued that the First Amendment affords broad protection to the associational rights of political parties in structuring and governing themselves, and that the Appellees' requested interference with the Party's internal structure would contravene the First Amendment. Appellant also argued that Drake II did not alter the election of 210 SDEC members from state house districts in the Democratic primary; thus, the only changes in the SDEC structure brought about by Drake II were with the affirmative action appointed seats, which should be afforded great protection by the First Amendment. The District Court panel failed to take into account that the SDEC had withdrawn the qualification requirement from Drake II[7] and neither addressed nor acknowledged Appellant's First Amendment arguments. Instead, the Court found that Drake II had the potential to discriminate because (1) the "qualification requirement" could encourage blacks to run against each other, or against whites who are the choice of blacks, thus diluting the black vote,

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[7]In the District Court's final order of December 21, 1990, the Court acknowledges in footnotes 3, Appendix at A-19, and 9, Appendix at A-20-21, that Appellant withdrew the qualification requirement, but mistakenly states that Appellant did so only after the District Court's August 20, 1990 order. Appellant respectfully disagrees with the District Court's statement. In a letter of July 24, 1990, to John Tanner of the Voting Rights Section, Susan Russ, on behalf of Appellant, SDEC, stated to the Justice that if Drake II were not precleared by August 4, 1990, then the SDEC would not enforce the qualification requirement. Each Judge of the three-panel District Court received a copy of this letter, as well as follow-up correspondence from Mr. Ed Still on behalf of Appellees and again from Ms. Russ, all of which referred to the SDEC's withdrawal of the qualification requirement. The Justice Department took Ms. Russ's letter to be such an unequivocal withdrawal of the provision that it considered her July 24, 1990 letter to be a "change" requiring another sixty day extension of the consideration period for preclearance submissions. Also, at oral argument, counsel for Appellant urged the District Court to consider and rule on Drake II without the qualification requirement based on counsel's July 24, 1990 correspondence with the Justice Department.

December 21 Opinion at 5 n.9, Appendix at A-20-21, and (2) the new formula for calculating the number of additional seats could result in fewer blacks on the SDEC than under the old rule. *Id.* Thus, the Court held Drake II covered by Section 5 and enjoined the Party from proceeding under the provision unless and until preclearance was received.

THE QUESTIONS ARE SUBSTANTIAL

The reach of Section 5 is broad; in order to be covered by the provision's submission requirement, an enactment need only be "a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. However, the reach of Section 5 is not boundless and does not extend to the private, organizational functions of a political party. That such must be the case is clear not only from the language of the statute and regulations themselves, but especially in light of the First Amendment's protection of a political party's rights of free association.

I. Section 5 Does Not Cover Drake II

The Justice Department has promulgated regulations under the Voting Rights Act dealing specifically with the interpretation of Section 5's definition of "coverage" with respect to the actions of a political party. The regulations acknowledge explicitly that Section 5 covers only those actions of a party that (1) affect voting rights, 28 C.F.R. § 51.12, (2) relate to a public electoral function of the party, 28 C.F.R. § 51.7, and (3) are enacted by the party when acting under the authority of a covered jurisdiction. *Id.* In contrast, § 51.7 of the regulations expressly provides that "[f]or example, *changes with respect to the recruitment of party members*" are *not* subject to the preclearance requirement. Regulation § 51.7 only mentions the selection of party officials within the sentence: *"Changes with respect to the conduct of primary elections at which . . . party officials are chosen."* The regulation plainly and appropriately omits the selection of party officers *not* by public election

but rather by internal procedures, *e.g.*, post-election affirmative action appointments.

When properly understood in the context of these regulations, it is clear that Drake II falls outside the coverage of Section 5. It neither affects voting rights nor relates to a public electoral function of the Party. It is not a change with respect to the conduct of primary elections where party officials are chosen; the elected members of the SDEC decidedly are *not* affected by Drake II. Rather, Drake II is a provision touching only the private organization of a party committee, and falls within the exception made in Regulation § 51.7 for the "recruitment of party members." Thus, this Court would be squarely within both the language and intent of the statute itself and the Justice Department's own regulations in ruling that the appointment of additional affirmative action members to the SDEC simply is not covered by Section 5 of the Voting Rights Act.[8]

A. *Drake II does not Affect the Right to Vote*

There is little doubt that the right to vote that Congress intended Section 5 to protect is, just as in one-person, one-vote cases, the right to choose "those who shall be [the citizen's] elected representatives in the conduct of government, *not in the internal management of a political party.*" *Lynch v. Torquato*, 343 F.2d 370, 372 (3rd Cir. 1965) (emphasis added) (application of one-person, one-vote rule to internal party affairs). Where party officers are *elected in primaries*, it *may* be that changes in these election procedures are covered by Section 5. *See* 28 C.F.R. § 51.7 ("Changes with respect to the conduct of *primary elections* at which party nominees, delegates to party conventions, or *party officials* are chosen are subject to the preclearance requirement of Section 5") (emphasis added); *MacGuire v. Amos*, 343 F. Supp. 119, 121 (M.D. Ala. 1972) (three-judge court) (per curiam) (election of party delegates to national

[8]Obviously, such a finding would not insulate the procedure from judicial review, as evidenced by Appellees' currently pending § 2 suit, but would respect the proper role of § 5 within the overall scheme of the Voting Rights Act.

conventions in *primary* elections is covered by Section 5). *But see United States v. Democratic Executive Committee of Wilcox County*, No. 6047-70 (S.D. Ala. Dec. 22, 1970) (three-judge court) (per curiam) (change to election in primary of county Democratic executive committee does not require Section 5 preclearance). However, the black Democrats who hold appointed affirmative action seats on the SDEC are not now, nor have they ever been, elected in primaries. Instead, they are internally appointed in a supplementary fashion *after* the election of the SDEC in the Democratic primary so that the number of blacks on the SDEC is increased beyond that elected at the ballot box. This change in the means of appointing affirmative action "add-on" members to a group that conducts the private affairs of a political organization does not affect voting for public office in any sense.

Appellees would perhaps assert that *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), makes any alteration "affecting the eligibility of persons to . . . become or remain office holders," no matter how selected, into a change affecting voting that requires preclearance. But the context of *Dougherty*, which concerns a candidate running for *elective* office, belies this suggestion. Further, 28 C.F.R. § 51.13(g), the 1987 counterpart to the regulation cited by *Dougherty* concerning eligibility "to become or remain holders of office," specifically indicates that it is a change affecting eligibility "to become or remain holders of *elective* office" that must be precleared. *Id.* (emphasis added). Again, affirmative action members of the SDEC do not hold elective office — nor are they public officials. *See Lynch*, 343 F.2d at 372 (party offices are not governmental offices); *Trevino v. Pastrick*, 573 F. Supp. 806, 807-08 (N.D. Ind. 1983) (precinct committeemen holding offices of political party are not public officials).

B. *Drake II does not Accomplish a Public Electoral Function*

Because Drake II does not affect the right to vote, the determinative question becomes whether a change in the Party's affirmative action plan relates to a public electoral function of the Party. Again, the one-person, one-vote context provides the response:

> The normal and ordinary responsibilities of . . . local party leaders are familiar. They administer a miscellany of party business. They may be responsible for raising and spending money in the party interest. They may plan and direct local political campaigns as well as continuing efforts to win new party adherents and to encourage voter registration between campaigns . . . .

Lynch, 343 F.2d at 372. As *Lynch* suggests, the overwhelming majority of the responsibilities of party officials concern the details of ordinary internal party affairs. It is only in the rarest of circumstances that the SDEC might act as a body to perform a public electoral function by filling a vacancy caused by the death or withdrawal of one of its candidates, or by hearing the appeal of an election contest. Many SDEC members — perhaps the majority — will serve their full terms of office without ever encountering such an event.

Furthermore, it is essential in analyzing Section 5's coverage of Drake II to maintain the careful distinction between two very distinct questions: (1) whether the SDEC accomplishes any public functions that affect voting; and (2) whether Drake II is one such public function. It would be ludicrous for the Party to assert that none of its actions is covered by Section 5.[9] The conduct of primary elections, including the election of SDEC members in the primary, is squarely within the language and intent of Section 5's preclearance requirement. However, the internal selection of its affirmative action appointments to increase black representation is decidedly not such a public function, but rather of the type clearly omitted from the Justice Department's regulations.

C. *Drake II does not have the Potential to Discriminate*

Appellees argued at the District Court level that Drake II has the potential to discriminate because, if a large number of blacks were elected to the SDEC, the Drake II plan would result in fewer affir-

[9]Indeed, the SDEC has never, contrary to the District Court's implication in its August 20, 1990 Order, Appendix at A-6, asserted that none of Appellant's actions is covered by Section 5.

mative action appointments than under the old rule. Appellees turn voting rights principles on their heads by complaining that too many blacks may gain seats on the SDEC by election rather than by post-election appointment.

Significantly, Appellees neglected to mention that the converse is true as well: if a smaller than usual number of blacks won election to the SDEC, *more* than 23 additional minority seats might be filled by the operation of Drake II. The salient point is that the minimum relative percentage always remains the same, no matter how many are elected.[10] Indeed, the Justice Department anticipated a situation in which more blacks than previously would be elected to the SDEC. In such a case, the Department said:

> the number of appointees necessary to achieve the minimum goal of population parity will be somewhat less than the previously agreed upon 23 seats. The adjustment of this number to a formula amount, under these circumstances, seems consistent with the remedial purpose of the plan *and is unobjectionable*.

Letter of James P. Turner to Al LaPierre of December 1, 1989, at 2-3 (emphasis added).

II. The District Court's Interpretation of Section 5 Violates Appellant's First Amendment Rights

Appellant's change in its voluntary affirmative action plan for structuring its own internal governing body is neither a change affecting voting within the meaning of Section 5 nor an enactment of a type that has the potential to discriminate against voting rights. But this Court may ask, if Section 5 is intended to reach even the most "minor or indirect" of changes affecting voting, 28 C.F.R. § 51.12, why should not the District Court be allowed to extend Section 5 beyond its stated boundaries just *in case* Drake II might

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[10]It is significant that Drake II provides a minimum, but no maximum, percentage for black Democrats. Thus, if few whites stood for election to the SDEC, blacks could be elected in percentages greater than those set forth in Drake II, up to 100%.

have some undemonstrable effect on voting rights? Because such an extension is not harmless over-protection of Section 5's coverage, but rather transgresses an integral constitutional right of the Party.

Even under ordinary circumstances the burden imposed by the requirement of Section 5 preclearance in vindicating voting rights is "stringent" and "extraordinary." *McCain v. Lybrand*, 465 U.S. 236, 244 (1984). But in the context of its application to political parties, there are *two* constitutionally protected rights at stake — not only the right to vote, but also the right to associate freely. As one moves further away from voting regulations touching on election balloting and more deeply into the internal affairs of political parties, associational rights grow stronger and weigh more heavily in the balance.[11] Thus, the requirement that a change *not* affecting voting rights be subject to investigation, delay and perhaps outright invalidation by the Justice Department is clearly not harmless but rather places a heavy burden on the Party's First Amendment rights of speech and association. As this Court recently insisted:

> [R]estrictions on the organization and composition of official governing bodies . . . directly implicate the associational rights of political parties and their members. As we noted in *Tashjian*, a political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution.'

Eu v. San Francisco Democratic Central Committee, 109 S.Ct. 1013, 1023-24 (1989) (citations omitted).[12]

Add to the strength of these associational interests the fact that the Court considers here not just intrusion into the internal organi-

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[11]*See Redfearn v. Delaware Republican State Committee*, 502 F.2d 1123, 1127-28 (3rd Cir. 1974), *on remand to* 393 F. Supp. 372 (D. Del. 1975), *aff'd*, 524 F.2d 1403 (3d Cir. 1975), *rev'd for reconsideration of intervening legislation*, 429 U.S. 809 (1976); Kester, *Constitutional Restrictions on Political Parties*, 60 Va. L. Rev. 735, 758 (May 1974).

[12]*See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

zation of a Party, but interference specifically with the Party's own private, voluntary affirmative action plan. Consequently, the scales clearly tip in favor of the First Amendment values at stake. The express purpose of an affirmative action plan is in step with that served and promoted by the First Amendment: "to open the [political] process to more diverse interests, groups, and individuals," and to promote "the vitality and fluidity" of that process. *Geary v. Renne*, 880 F.2d 1062, 1065-66 (9th Cir. 1989) (discussion of expansion of political process in context of evaluating party's first amendment rights), *rev'd on rehearing en banc on other grounds*, 911 F.2d 280 (9th Cir. 1990), *cert. granted*, ___ S.Ct. ___, 59 U.S.L.W. 3481 (Jan. 14, 1991) (90-769). As this Court recently underscored, "[a] Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

Thus when this Court weighs the extremely strong First amendment values not only implicated, but actually promoted, by a political party's private, internal affirmative action plan against any hypothetical and attenuated effect on the election of public officials, it is clear that the balance should be struck against Section 5 coverage and in favor of the First Amendment.

The District Court's action in requiring Appellant to submit Drake II for preclearance clearly controverts this Court's repeated directive that courts defer to political parties in matters of their internal affairs.[13] In *O'Brien v. Brown*, 409 U.S. 1 (1972), this Court insisted that "judicial intervention in this area has traditionally been approached with great caution and restraint." *Id.* at 4. Likewise, in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), this Court explicitly directed that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Id.* at 123-24. Significantly, the

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[13]The Drake II procedure does not approximate the "state function" of regulating political primaries as was found by the "White Primary" cases to justify federal intervention. *See, e.g., Nixon v. Herndon*, 273 U.S. 536 (1927); *Smith v. Allwright*, 321 U.S. 649 (1944).

Court recognized that "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution . . . . " *Id.* at 124 n.26 (quoting with approval *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (emphasis in original), *cert. denied*, 424 U.S. 933 (1976)).

Again in *Tashjian*, 479 U.S. 208, this Court upheld the First Amendment rights of a political party against contrary state law, insisting that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224. And most recently in *Eu*, 109 S.Ct. 1013 (1989), this Court struck down California restrictions on the organization and composition of official governing bodies of the state and local Democratic party as an unconstitutional infringement on the party's First Amendment rights of freedom of association, stating:

> Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. . . . Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. . . . Here, party members do not seek to associate with non-party members, but only with one another in freely choosing their party leaders.

Id. at 1024. Thus, in *Eu* this Court not only continued its insistence upon the recognition of the First Amendment rights of political association, but also insisted particularly on the protection of such rights for the party's internal structure, holding: "[A] State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure . . . . " *Id.* at 1025. Appellant seeks just such protection of its constitutional rights here.

This Court has relentlessly protected the First Amendment rights of political parties to determine their internal structure, and such protected status cannot be ignored in the context of Section 5. Appellant implores this Court to restore its First Amendment rights by

finding, on the narrow question of whether the Party's internal structural rules are subject to Section 5, that such rules do not approximate a public function and are not within the scope of the Section 5 preclearance requirement.

Without question, the Appellant does not attempt to remove from judicial scrutiny any public electoral function of the State Democratic Party. Neither does the Appellant make any attempt to deny that those of its actions that affect voting practice or procedure in the State of Alabama or any subdivision thereof are subject to the preclearance requirement of Section 5 of the Voting Rights Act prior to their effective date, and subject to the standards, strictures and remedies of Section 2 of the Voting Rights Act after their effect date. Rather, Appellant seeks only this Court's protection of Appellant's right to exercise its "discretion in how to organize itself, conduct its affairs, and select its leaders" and to associate "with one another in freely choosing their party leaders." *Eu*, 109 S.Ct. at 1024. This Court must review the decision of the District Court because the District Court's reasoning defies the language and intent of Section 5 and the regulations thereunder, and ignores Appellant's First Amendment rights and this Court's recognition of the protections afforded political parties by the First Amendment to the United States Constitution.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 89-T-381-S
JOHN BAKER, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA; J. HOLT ETHERIDGE, Chairman of the Henry County Executive Committee; HENRY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, as a committee and all county Democratic executive committees similarly situated; and DEMOCRATIC PARTY OF THE UNITED STATES,	)	
Defendants.	)	

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District Judge.

THOMPSON, District Judge:

Plaintiffs Thomas Hawthorne and Emory Newman, on behalf of themselves and other African-American Democrats in Alabama, claim in this lawsuit that recent changes in the way members of the State Democratic Executive Committee and members of 47 of the 67 County Democratic Executive Committees are selected must be

precleared under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973c. This three-judge court has been convened to hear these claims pursuant to 28 U.S.C.A. § 2284 and 42 U.S.C.A. § 1973c. We conclude that the changes are subject to preclearance as to the state committee and as to 45 of the county committees.

I.

On April 17, 1989, the plaintiffs filed this lawsuit in the United States District Court for the Middle District of Alabama, claiming that the Democratic Party at its local, state, and national levels has denied them and other African-American citizens of Alabama an opportunity equal to that of white citizens for representation on party governing bodies. The plaintiffs rested their claims on § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973, and on the fourteenth and fifteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. § 1983. The plaintiffs named as defendants the Democratic Party of the United States, the State Democratic Executive Committee of Alabama and its chair, and the Henry County Democratic Executive Committee and its chair. The single-judge district court certified a plaintiff class of all black Democrats in Alabama. The court also certified a defendant class of all 67 County Democratic Executive Committees in Alabama.

Under the State Democratic Executive Committee's existing plan for selecting its members, each of the state's 105 House districts elects two persons, one male and one female, to serve four-year terms. The state committee then authorizes a number of other organizations to appoint additional persons to serve on the committee. One of these organizations is the Alabama Democratic Conference ("ADC"), a state-wide, predominantly black political organization. The ADC appoints 23 members to serve on the committee. The state committee's existing plan, as last modified in 1983, was precleared by the United States Attorney General.

In April 1989, shortly before this lawsuit was filed, the state committee adopted a new plan for selecting its members. The committee proposed to change from a fixed requirement of 23 addi-

tional appointments to a formula designed to guarantee that the proportion of black persons on the committee would at least equal the proportion of blacks in the general population. Instead of allowing the ADC to fill the appointed seats from among all black Democrats, the state committee's new plan called for additional members to be appointed only from among the unsuccessful black candidates, in descending order according to the number of votes each received in the committee election. The United States Attorney General refused to preclear this plan, noting his particular concern about the provision which allowed the appointed slots to be filled only from among blacks who ran unsuccessful campaigns.[1] The Attorney General wrote that this "change . . . could result in selection of persons in majority black districts who had failed to attract local black support."[2]

In January 1990, in response to the Attorney General's objection, the state committee modified its new plan for selecting members. This proposal, like the previous one, abolishes the right of the ADC and other groups to appoint additional members. The new plan, however, modifies the provision governing the number of blacks on the state committee; it requires that the proportion of black persons on the state committee must be at least equal to the proportion of blacks in the general population *or* the proportion of blacks voting in the Democratic gubernatorial primary, whichever is greatest. The plan also modifies the manner in which this requirement is to be met; it provides that the black members elected in the primary are to select the additional blacks, but only from the blacks who quali-

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[1]The 1989 plan also proposed to change the way in which the state committee's Vice-Chairperson for Minority Affairs is selected and the way in which blacks are appointed to the state committee's executive board. Under existing rules, the President of the ADC automatically serves as Vice-Chairperson for Minority Affairs, and the 23 committee members appointed by the ADC elect three of their number to serve on the executive board. Under the proposed 1989 plan, the Vice-Chairperson of Minority Affairs would be elected by the entire state committee, and the ADC's three executive board seats would be eliminated. The Attorney General objected as well to these provisions in the plan.

[2]Letter from James P. Turner, Acting Assistant Attorney General, to Albert W. LaPierre, Alabama Democratic Party, dated December 1, 1989.

fied but were not elected.[3] In March 1990, the state committee submitted the new plan to the Attorney General, but he has yet to issue a decision.[4] In that same month, the state committee began accepting qualification papers of candidates under the new plan for the June Democratic gubernatorial primary. Counsel for the state committee informed the court at oral argument, however, that, although the June primary election has now passed and committee members have now been elected, the state committee has not implemented the part of the new plan changing the method of appointment blacks to the committee.

Like the state committee, 45 of the County Democratic Executive Committees across the State of Alabama have altered their systems for selecting members, and many have implemented them without preclearance from the Attorney General. Seventeen of these committees adopted plans which merely provide for the appointment of members in addition to those who are elected. The plans for 16 of these counties, however, differ from the state committee's plan in that they provide for the appointment of *both* black and white additional members.[5] The seventeenth committee's plan — the plan for Autauga County Democratic Executive Committee — is similar to the state committee's in that it provides for the appointment of blacks only. The other 28 county committees have altered the process by which members are elected; they have redrawn district lines, changed the nature of the units from which members are

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[3]The plan also provides for selection of the Vice-Chairperson for Minority Affairs by the elected black members, and guarantees black members a proportionate share of seats on the executive board.

The primary purpose behind all these changes, according to counsel for the state committee, is the transfer of authority over who will fill the appointed seats from the exclusive control of the ADC to all black elected members of the state committee, including independents and those affiliated with the Alabama New South Coalition, a new, predominantly black organization. Defendants' brief filed on July 9, 1990, p. 5.

[4]Since the state committee submitted its plan for preclearance, the Attorney General has requested additional information and thereby extended his time to render a decision. *See* 28 C.F.R. § 51.37.

[5]These 16 committees are from the following counties: Baldwin, Chilton, Clay, Dale, Dallas, Geneva, Jefferson, Lowndes, Marion, Randolph, Russell, Tallapoosa, Tuscaloosa, Walker, Wilcox, and Winston.

elected,[6] or changed the number of members elected from a particular district.[7]

On March 22, 1990, the plaintiffs filed additional claims in this lawsuit alleging that the state committee and many, if not all, of the 67 county committees were proceeding to implement new plans for selecting their members, without having first secured preclearance under § 5 of the Voting Rights Act of 1965, as amended. After this three-judge court was convened to hear the plaintiffs' § 5 claims, the plaintiffs dropped their claims against 20 of the county committees.

II.

Section 5 of the Voting Rights Act of 1965, as amended, requires that certain jurisdictions, including the State of Alabama and its subdivisions, preclear any change in a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C.A. § 1973c. A jurisdiction may obtain preclearance in either of two ways: by securing a determination from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," *id.*; or by submitting the change to the Attorney General of the United States and receiving no objection. *Id.*

Under § 5, the permissible scope of the three-judge court's inquiry is limited to whether a change "is covered by § 5, but has not been subjected to the required federal scrutiny. *Allen v. State Board of Elections*, 393 U.S. 544, 561, 89 S.Ct. 817, 829 (1969). It is undisputed that the state committee's and the county committees'

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[6]Many propose to elect their members from county commission districts rather than from precincts or beats.

[7]These 28 committees are from the following counties: Barbour, Bibb, Chambers, Cherokee, Clarke, Coffee, Coosa, Crenshaw, DeKalb, Elmore, Escambia, Fayette, Hale, Henry, Houston, Lamar, Lauderdale, Lawrence, Lee, Limestone, Marengo, Montgomery, Morgan, Perry, Pickens, Shelby, St. Clair, and Washington.

The plans for at least 22 of these committees also include the appointment of additional members, in most cases both black and white members, but in four cases black members only.

new plans have not been precleared. The only point of inquiry for this court, therefore, is whether the plans are covered by § 5.

A.

We must address first the contention of the state and the county committees that they are not entities subject to the requirements of § 5. This court has previously held that political parties in this state, to the extent they are empowered by the state to conduct primary elections and to have their national convention delegates selected, are subject to § 5. *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) (per curiam) (Rives, Johnson, and Varner, JJ.). "Where the political parties are given such head by a specific statutory grant of authority," the court explained, "their actions arise to the level of actions by the State," with the right to vote in their elections "specifically guaranteed in the 1965 Voting Rights Act." *Id.* at 121. *Cf. United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 122, 98 S.Ct. 965, 974 (1978) ("§ 5 has to apply to all entities exercising control over the electoral processes within the covered States or subdivisions").

The Attorney General's regulations reflect a similarly inclusive reach for § 5. They provide that "Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5." 28 C.F.R. § 51.7. In fact, pursuant to this regulation, the Attorney General approved the state committee's plan in 1983 and objected to a revised version in 1989, expressly noting in his objections that "the selection of officers and members of the [State Democratic Executive Committee] in this submission may not be implemented without meeting the preclearance requirements of Section 5."[8] "Given the central role of the Attorney General in formulating and implementing § 5, [his] interpretation of its scope is entitled to particular deference." *Dougherty County v. White*, 439 U.S. 32, 39, 99 S.Ct. 368, 373 (1978).

[8]Letter from James P. Turner, Acting Assistant Attorney General, to Albert W. LaPierre, Alabama Democratic Party, dated December 1, 1989.

Based on *MacGuire*, we therefore hold that, to the extent the State Democratic Party is empowered to conduct primary elections in which it selects members of its state committee and county committees, its actions, as well as those of its state and county committees, fall within the coverage of § 5.

B.

Whether a specific change adopted by a political party is covered by § 5 turns on whether the change is a "standard, practice, or procedure with respect to voting," 42 U.S.C.A. § 1973c, which has the "potential for discrimination" against African-Americans. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985) (emphasis omitted). The Voting Rights Act of 1965 fails to define when a change relates to voting other than to define the term "voting" to "include all action necessary to make a vote effective." § 1973*l* (c)(1). Supreme Court cases teach, however, that Congress intended the Act to reach any enactment which altered election procedures "in even a minor way," *Allen*, 339 U.S. at 566, 89 S.Ct. at 832, and that the phrase "standard, practice, or procedure" must be given the "broadest possible scope." *Id.* at 567, 89 S.Ct. at 832. *See also, e.g., Dougherty County*, 439 U.S. at 37-38, 99 S.Ct. at 372. These cases also teach that it is not the task of a three-judge court, such as ours, "to determine whether the changes at issue . . . in fact resulted in impairment of the right to vote, or whether they were intended to have that effect," *Hampton County Election Commission*, 470 U.S. at 181, 105 S.Ct. at 1137, but that that "task is reserved by statute to the Attorney General or to the District Court for the District of Columbia." Id. Our task is to determine whether discrimination is a "plausible consequence" of the change. *Turner v. Webster*, 637 F. Supp. 1089, 1092 (N.D. Ala. 1983) (three-judge court) (Vance, J.).

With the above principles in mind, we conclude that the state committee's proposed new plan has the potential to discriminate with respect to voting for two reasons. First of all, the plan includes new provisions which require that the state committee's additional black members be selected from those blacks who qualified in the

Democratic gubernatorial primary but lost. This "loser eligibility" provision effectively requires that persons qualify to run for the committee in order to be eligible for the appointed positions. This provision affects voting and has the potential to discriminate because it could conceivably encourage blacks to run against other blacks, or against whites who are the choice of blacks, and thus split and dilute the black vote.

Second, under the state committee's new plan, the number of additional black appointments would no longer be a guaranteed 23 but would depend, in part, on the number of blacks elected: the more blacks elected, the fewer blacks who must be appointed to meet the plan's racial proportion requirement. The plan's provisions for election and appointment of blacks are thus inextricably linked. In fact, the state committee admits in its brief that the appointive provisions in its new plan are "aimed at remediating discrimination";[9] they are, according to the state committee, "meant to compensate" for the electoral system's failures."[10] In the absence of the plan's appointment provisions, the state committee would have to modify its elective procedures to achieve the same results. The proposed new plan's provisions for election *and* appointment of blacks relate directly to voting; and they have the potential to discriminate because they could result in fewer blacks on the state committee than under the existing plan.

The state committee argues that appointments in general do not relate to voting under § 5. Whether § 5 covers appointments is an issue this court need not reach. Our narrow holding is that under the special circumstances presented here, where the appointment process is intended to ameliorate the elective process and thus is directly tied to it, the appointment process is covered by § 5. The state committee also argues that its appointment procedure is an affirmative action plan which should not fall within § 5's coverage. Whether affirmative action plans, as such, should or should not fall within § 5's coverage is again a matter we need not reach. Our concern is merely that, because certain features in the plan — how-

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[9]Defendants' brief filed on July 9, 1990, p. 14.

[10]*Id.* at 21.

ever they are labeled — relate to voting and have the potential to discriminate, the plan must be precleared under § 5.

C.

The plaintiffs claim that the new plans adopted by 47 of the county committees have several features which bring the plans within § 5's coverage. We agree as to 45 of these committees. Twenty-eight of the county committees have in some manner altered the way they elect their members.[11] Some have redrawn district lines, some have changed the nature of the units from which members are selected, and others have changed the number of members elected from a particular district. It is well established that such changes affect voting and have the potential for discrimination, and as such are covered by the requirements of § 5. *See City of Lockhart v. United States*, 460 U.S. 125, 103 S.Ct. 998 (1988) (increase in number of seats on city governing body subject to preclearance); *Georgia v. United States*, 411 U.S. 526, 531-32, 93 S.Ct. 1702, 1706 (1973) (changes in electoral boundaries and creation of multi-member districts subject to preclearance); *Perkins v Matthews*, 400 U.S. 379, 391-92, 91 S.Ct. 431, 438 (1971) (changes in electoral boundaries and from ward to at-large elections both covered under § 5); *Allen*, 393 U.S. at 569, 89 S.Ct. at 833 (change from district to at-large voting covered under § 5); 28 C.F.R. 51.13(c) (§ 5 covers "any change in the constituency of an official or the boundaries of a voting unit").

Sixteen of the county committees have provisions for the appointment of both black and white members to supplement elected members.[12] We find that the provision for white appointments has the potential to discriminate as to voting. Should black electoral success in elections trigger the selection of additional white mem-

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[11]*See* note 7, *supra*. As noted, some of these 28 committees have provisions in their new plans for the appointment of additional members, both black and white. For the reasons given later in this order, we conclude that, because these plans provide for the appointment of white members, they are subject to § 5 preclearance as well.

[12]*See* notes 5 & 7, *supra*.

bers, such appointments could dilute black voting strength by reducing the proportion of members who are chosen by and thus represent black voters. *See Perkins*, 400 U.S. at 388, 91 S.Ct. at 437 ("right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote") (citation omitted).

The only change in the Autauga County Democratic Executive Committee's plan is for the appointment of blacks. Counsel for the committee contends that such a plan has no potential to discriminate. Whether such a change, by itself, is subject to preclearance is an issue we need not reach.[13] We understand from the committee's counsel that the districts from which the county committee's members are elected were adopted after November 1, 1964, the benchmark date for § 5 coverage,[14] but were never submitted for preclearance for use in committee elections. The committee's plan is therefore due to be submitted to the Attorney General for this reason.

We cannot reach similar conclusions as to the remaining two of the 47 county committees: the Greene and Monroe County Democratic Executive Committees. Plaintiffs have failed to submit any evidence that these two county committees have changed the way they select their members.

III.

The final issue for the court is an appropriate remedy. Because the purpose of § 5 is "to *prevent* the institution of changes which might have the purpose or effect of denying or abridging the right to vote on account of race or color," *Perkins*, 400 U.S. at 385, 91 S.Ct. at 435 (emphasis added), this court is obligated, absent "unusual circumstances," to enjoin enforcement of a change that should have been precleared but was not. *Henderson v. Graddick*, 641 F. Supp. 1192, 1202 (M.D. Ala. 1986) (per curiam) (three-judge

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[13]*See* 28 C.F.R. § 51.12 ("Any change affecting voting, even though it . . . ostensibly expands voting rights . . . must meet the section 5 preclearance requirement").

[14]*See* 42 U.S.C.A. § 1973c.

court) (Johnson, Hobbs, and Thompson, JJ.).[15] The Supreme Court has indicated that special circumstances warranting and exception might be present where, because elections have already been held pursuant to an unprecleared voting requirement, it would be inequitable to return completely to the status quo ante pending submission of the change for preclearance. Under these circumstances, the Court explained, "it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming. *Perkins*, 400 U.S. at 396-97, 91 S.Ct. at 441.

Counsel for the state committee informed this court at oral argument that its new plan has yet to be implemented in full and that the status quo is effectively still the 1983 plan. Under these circumstances, we conclude that we must enjoin enforcement of the new plan unless and until it is precleared.[16] We understand, however, that the circumstances are quite different with regard to many of the 45 county committees whose plans, we conclude, must be precleared. Many committees have already enforced their new plans,

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[15]*See also Conner v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1975) (per curiam) (acts covered by § 5 "are not now and will not be effective as laws until and unless precleared pursuant to § 5"); *Georgia v. United States*, 411 U.S. at 451, 93 S.Ct. at 1711 (future enforcement of reappointment plan would be enjoined unless and until precleared).

[16]The state committee suggested at oral argument that, if this court should find that the proposed new plan is subject to preclearance, it should impose as an interim remedy a variation of the new plan, in which the elected black members of the state committee, rather than the ADC, would select the additional black members, but without the loser eligibility requirement. The state committee contends that the existing 1983 plan is unfair to black voters who are not members of the ADC. *See* note 3, *supra*. Whether the existing plan is unfair or illegal for reasons unconnected with § 5 and whether, for these reasons, the plan should not be continued in force are matters outside the jurisdiction of this three-judge court. *See Henderson v. Graddick*, 641 F. Supp. at 1209 (although a three-judge court has broad remedial powers under § 5, those powers do not extend beyond the relief necessary to vindicate the specific right at issue). These matters should be addressed instead, if any where in this on-going litigation, to the single-judge court which is currently considering a challenge to the existing plan under § 2 of the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

and new members have been chosen under them. Plaintiffs and the county committees agree that the court should enjoin enforcement of the new plans in such circumstances only if the counties are unable to obtain preclearance after having been given a reasonable opportunity to do so. We cannot, however, determine on the present record which county committees fall within this category. We will therefore give the plaintiffs and the county committees 14 days to submit to the court proposed relief as to each of the 45 county committees.

It is so ORDERED.

DONE, this the 20th day of August, 1990.

/s/ Frank M. Johnson, Jr.

UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

Hobbs, J., concurring in part and dissenting in part

I concur fully with the judgment of this court that the changes to the rules of the State Democratic Executive Committee (SDEC) must be precleared by the United States Justice Department pursuant to section 5 of the Voting Rights Act. I also agree with the court's judgment with respect to the various county plans. I do not agree, however, that our remedial powers are as limited as suggested by the majority opinion and, therefore, must respectfully dissent from that portion of the judgment.

The majority concludes that its only recourse is to enforce the Democratic Party's 1983 plan of electing and choosing members to the SDEC. Neither the law nor the facts of this case require such a resolution. The state Democratic Party made three changes to the executive committee election and selection process: 1) the "loser eligibility" rule for qualifying for an appointed seat; 2) the manner in which the number of appointed seats is calculated; and 3) the provision placing the appointive powers in the hands of the elected Afro-American members of the SDEC. As more thoroughly discussed in the majority opinion, the first two changes directly affect voting and could have a potential for discrimination. Thus, it is appropriate that these two changes not be enforced unless preclearance is obtained. For the time required for the Democratic Party to achieve preclearance of a plan, I would agree with the majority opinion that the 1983 plan for appointing black seats at twenty-three should be followed and effect should not be given to the loser-eligibility rule.

I do not believe, however, that the portion of the 1983 plan placing complete power over appointing Afro-American seats with the Chairman of the Alabama Democratic Conference (ADC) must be enforced. Both parties agree that the ADC represents only a portion of the Afro-American members of the Democratic Party. The Democratic Party has attempted to change this patently unfair and undemocratic practice by placing the appointive power in a body of Afro-Americans elected by their representative group. As implicitly recognized by the majority, this change from a selection process that ignores a significant portion of the Afro-American

Democratic voters to a process which democratically elects those Afro-American members who will make the appointments has no plausible potential to discriminate against Afro-American voters. I, therefore, would permit the newly elected black members of the SDEC to select the twenty-three persons to fill the additional seats as part of an interim remedy until a plan is proposed which meets the requirements of Section 5 of the Voting Rights Act.

This is not to say that the entire election and selection plan does not have to be precleared. Obviously, it represents a comprehensive program that should not be submitted piecemeal to the Justice Department. As a three judge panel, however, we have the authority to fashion a remedy "appropriate" to the situation presented to us. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183 n. 36 (1985); *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971). Factors relevant in fashioning an appropriate remedy include "the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by §5." *Perkins*, 400 U.S. at 396. The latter factor is important insofar as it indicates a "deliberate defiance of the [Voting Rights] Act." *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969). The Democratic Party has made a substantial effort in this case to comply with the preclearance requirements of the Voting Rights Act. It first submitted proposed changes to the Attorney General in 1989. In response to objections made by the Attorney General to that plan, the Democratic Party drafted the plan before this Court. It was submitted to the Attorney General in March , 1990, with a request for expedited consideration pursuant to 28 C.F.R. § 51.34(a). Even without expedited consideration, the March, 1990 filing was long enough before the June, 1990 election to allow the Attorney General the full sixty days usually required to evaluate a submission. 28 C.F.R. § 51.9. The Attorney General, however, has requested additional time for considering the Democratic Party's submission and has yet to make a final determination of this plan. Under these circumstances, and given that the change concerning appointment power has no potential to discriminate, I believe it is appropriate to give effect as an interim plan to the change sought by the Democratic Party with respect to the appointment power.

Although not strictly applicable in this case, the Voting Rights Act cases addressing reapportionment plans also are instructive in determining what might be an "appropriate" remedy. In these cases, voting districts had to be redrawn to account for new congressional seats added or removed after the national census. Because the old plans were in violation of the constitutional principle of one man one vote, they could not be enforced. *See Upham v. Seamon*, 456 U.S. 37, 38 (1982). Often, however, election dates approached before new plans could be precleared by the Attorney General. Federal three judge panels, therefore, routinely had to draft interim reapportionment plans that would allow the elections to go forward. The Supreme Court cautioned these three judge district court panels to be mindful of the political choices of the entities they were reviewing while being sure to adopt interim plans that honored the Constitution. *Upham v. Seamon*, 456 U.S. at 43. Thus, the standard under which the district courts operated in forming interim plans was to defer to the political judgments of the legislating body where such deference would not result in a Constitutional or Voting Rights Act violation. Upham *v. Seamon*, 456 U.S. at 41, *quoting White v. Weiser*, 412 U.S. 783, 794-95 (1973); *see Burton v. Hobbie*, 543 F. Supp. 235 (M.D. Ala. 1982) (three judge court) (Johnson, Hobbs, and Thompson, JJ.).

I see no reason for not applying the same rationale to the changes before us. The 1983 plan is itself discriminatory against a significant portion of the Afro-American Democratic voters. *See Burton v. Hobbie*, 543 F. Supp. at 243-43 (Johnson, J., concurring) (refusing to accept an interim remedy which itself was discriminatory). The choice to shift the appointive power from the exclusive control of one Afro-American group to a more democratically elected Afro-American group represents the resolution of a political battle within the Alabama Democratic Party. That choice has no potential for discrimination, and thus no potential for violating the Constitution and Voting Rights Act. Faced with a choice between the two plans, I think it not only "appropriate" but also wise to defer to the Party's political choice and allow the Afro-American elected members of the SDEC to appoint additional members. A refusal to allow this change adopted by the Democratic Party could

well result in a continuation for several years of the unfair practice, which the Party sought to correct, of having one Afro-American group impose its choices irrespective of the wishes of other Afro-American groups.

/s/ Truman Hobbs

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, etc.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION. NO. 89-T-381-S
JOHN BAKER, etc., et al.,	)	
Defendants.	)	

ORDER

For good cause, it is ORDERED that the single-judge court shall enter those orders necessary to carry out the three-judge court's order of August 20, 1990.

DONE, this the 12th day of September, 1990.

/s/ Frank M. Johnson, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, etc.,	)	
Plaintiffs,	)	
ANDRE KEITH, etc., Plaintiff-Intervenor,	)	
v.	)	CIVIL ACTION NO. 89-T-381-S
JACK HURLEY, etc., et al.,	)	
Defendants.	)	

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District Judge.

THOMPSON, District Judge:

In this action, plaintiffs Thomas Hawthorne, Emory Newman, and Andre Keith, on behalf of themselves and other African-American Democrats in Alabama, claimed that a change in the method used by defendant State Democratic Executive Committee to supplement its elected black membership had to be precleared under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973c. The court agreed that § 5 required the state committee's new plan to be submitted for preclearance.[1] The Attorney General of the United States subsequently approved the proposed change.

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[1] *See* Order dated August 20, 1990.

The cause is now before the court on the committee's motion to be allowed to implement the new plan for choosing additional members at a special meeting of its elected black membership. Plaintiffs oppose this motion, arguing that the designation by the committee of a new date for filling appointed seats would itself constitute a change in voting that must be precleared under § 5. For the reasons set forth below, the court concludes that the committee's motion is due to be granted.

I.

In January 1990, the state committee adopted a new plan for selecting its members.[2] Under the previous system, the Alabama Democratic Conference ("ADC"), a state-wide, predominantly black political organization, was authorized to appoint 23 members to serve four-year terms on the committee alongside those members elected in the Democratic gubernatorial primary. The committee proposed to switch to a formula under which additional black members would be chosen only to the extent necessary to insure that the proportion of black persons on the committee would be at least equal to the proportion of blacks in the general population *or* the proportion of blacks voting in the gubernatorial primary, whichever was greatest.[3] According to this new formula, 15 additional black members would be appointed at the committee's 1990 organizational meeting.[4] The new plan also abolished the right of the ADC to appoint members, an instead authorized those blacks elected to the committee to fill the additional seats.[5]

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[2]For a more extensive discussion of the background to this lawsuit, *see* Order dated August 20, 1990, at 2-7.

[3]The January 1990 plan, as originally enacted, also required additional members to be appointed only from among blacks who had run for committee seats and lost. However, after our August 20, 1990 decision in this case, the committee withdrew this element of the proposal from consideration and the Attorney General approved the change absent the loser-eligibility provision. The state committee does not seek to implement this provision and it is therefore not an issue before the court.

[4]This number was derived from an estimate that blacks constituted 32% of the electorate in the 1990 Democratic gubernatorial primary.

[5]The new plan also provided for selection of the state committee's Vice-Chairperson for Minority Affairs by the elected black members, and guaranteed black members a proportionate share of seats on the committee's executive board.

In March 1990, plaintiffs — who had already challenged the old system for selecting members of the state committee under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973[6] — filed additional claims alleging that the committee and its chairperson, John Baker, were proceeding to implement the new plan without having first secured preclearance under § 5.[7] The state committee had earlier submitted its new plan to the Attorney General but it had not yet been precleared, nor had this court ruled on plaintiffs' § 5 challenge, when the committee held its 1990 organizational meeting on August 2, 1990. Plaintiffs and the committee now disagree as to what occurred when a caucus of the elected black members was convened at this meeting. However, neither side contends that the entire elected black membership of the committee voted to select a group of 15 additional members; thus, strictly speaking, the new plan was not actually implemented.[8]

On August 20, 1990, this court found that the new plan constituted a change in voting that had a potential to discriminate against minority voters, and concluded that the change had to be precleared under § 5.[9] In October 1990, the Attorney General notified the state

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[6]The new plan was adopted several months after plaintiffs filed this lawsuit, claiming that the Democratic Party at its local, state, and national levels had denied them and other African-American citizens of Alabama an opportunity equal to that of white citizens to be represented on party governing bodies, in violation of § 2 and the fourteenth and fifteenth amendments to the United States Constitution. The motion now before the court involves only the State Democratic Executive Committee.

[7]Jack Hurley, the state committee's new chairperson as of August 1990, has since been substituted for Baker as a defendant in this lawsuit.

[8]Plaintiffs suggest that proceedings at the beginning of the caucus were consistent with the terms of the new plan, but acknowledge that, at that time, 23 rather than 15 members were selected, and do not dispute that the 23 proposed appointees were permitted to participate in the vote on whether they themselves should be seated. Defendants, in turn, suggest that the new plan was, in effect, put into place later in the meeting, but do not deny that only a fraction of the elected black members were present when 15 additional appointments were voted on. ADC-affiliated members had left the meeting under the legitimate assumption that the old selection rule was still in effect and that the 23 persons chosen by the ADC had already been appointed. Clearly therefore, the selection process in both portions of the meeting deviated significantly from that required under the new plan.

[9]The court ruled that the change had a potential to discriminate with respect to voting for two reasons. First, we found that the requirement, since removed from

committee that he did not interpose any objections to the new plan, "with respect to the [committee's] 1990-1994 term."[10] Soon after, the committee filed a "motion for clarification" with the court, in which it requested permission to convene a special meeting of its black caucus in order to select additional members pursuant to the terms of the new plan for the remainder of the 190-94 term. The committee contends that § 5 does not cover post-hoc implementation of a change in voting that has been precleared after the effective date specified in the submission. Plaintiffs, on the other hand, argue that the proposal that the committee submitted and the Attorney General precleared called for additional members to be chosen at the organizational meeting in 1990; according to plaintiffs, because this meeting has already occurred, any special meeting held on a new date would constitute a change in voting, and, therefore, require preclearance under § 5.

II.

Under § 5, the only issue before a three-judge court is whether a chance "is covered by § 5, but has not been subjected to the required federal scrutiny." *Allen v. State Board of Elections*, 393 U.S. 544, 561, 89 S.Ct. 817, 829 (1969). *Accord McCain v. Lybrand*, 465 U.S. 236, 250 n,17, 104 S.Ct. 1037, 1946 n.17 (1984).[11] Sec-

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the plan, that additional members be chosen from among only those blacks who had unsuccessfully sought election to the committee "could conceivably encourage blacks to run against other blacks or against whites who are the choices of blacks, and thus split and dilute the white vote." Order dated August 20, 1990, at 11. Second, we also noted that the new formula for calculating the number of additional seats "could result in fewer blacks on the state committee than under the existing plan." *Id.* at 12.

[10]*See* state committee's motion for clarification, Exhibit A.

[11]The state committee suggests that the Attorney General's use of the phrase, "for the 1990-94 term," in his letter precleared the new plan evinces his approval of a special meeting to implement the change. Because the court finds that the convening of a special meeting lacks a potential for discrimination, it need not resolve the issue of whether, by precleaning the plan after the committee's 1990 organizational meeting, the Attorney General, in effect, also precleared a special meeting. However, we note that the Supreme Court refused to find "implicit" preclearance of a new election date under similar circumstances in *N.A.A.C.P. v. Hampton County Election Comm'n*, 470 U.S. 166, 181-83, 105 S.Ct. 1128, 1137-38 (1985).

tion 5 requires preclearance of any change in a "standard, practice, or procedure with respect to voting," 42 U.S.C.A. 1973c, which has the "potential for discrimination" against African-Americans. *N.A.A.C.P. v. Hampton County Election Comm'n,* 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985). As we emphasized in our previous § 5 decision in this lawsuit, Congress intended the Voting Rights Act to reach any enactment which altered election procedures "in even a minor way," *Allen,* 393 U.S. at 566, 89 S.Ct. at 832, and for the phrase, "standard, practice, or procedure" to be given the "broadest possible scope." *Id.* at 567, 89 S.Ct. at 832. *See also Dougherty County v. White,* 439 U.S. 32, 37-38, 99 S.Ct. 368, 372 (1978). Supreme Court cases in this area also teach that it is not the task of a three-judge court "to determine whether the changes at issue . . . in fact resulted in impairment of the right to vote, or whether they were intended to have that that effect," *Hampton County Election Comm'n,* 470 U.S. at 181, 105 S.Ct. at 1137, but that this "task is reserved by statute to the Attorney General or to the District Court for the District of Columbia." *Id.* Our role is to determine whether discrimination is a "plausible consequence" of the change. *Turner v. Webster,* 637 F. Supp. 1089, 1092 (N.D. Ala. 1986) (three-judge court) (Vance, J.).

Nevertheless, however, light may be the burden which plaintiffs must satisfy in order to demonstrate that a change in voting carries a "potential" to discriminate, it cannot be treated as so minimal as to write this requirement completely out of existence. Plaintiffs have failed to offer *any* scenario according to which the change in this case — selection of additional black committee members at a soon-to-be-held special meeting, rather than at the August organizational meeting — could potentially disadvantage black voters, elected black committee members, or blacks hoping to be chosen for additional seats. Plaintiffs do assert that a reduction in the number of additional appointments from 23, under the previous system, to 15, under the new plan's formula for 1990, is a "retrogressive" change.[12] However, such a comparison is misplaced because it ignores the fact that the Attorney General has already precleared the

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[12]Plaintiff's opposition to state committee's motion for clarification, at 2.

new plan along with its mechanism for calculating the number of additional seats reserved fro blacks. Rather, the relevant change, whose potential to discriminate we must determine, is that from the plan as precleared to the plan as the committee now seeks to implement it. In other words, we must compare, as we have, the original provision for the committee's black caucus to select further members at the August 1990 organizational meeting, with the committee's current effort to convene a second, special meeting of the caucus to make such appointments according to the same procedures, but at a date later than that previously designated and precleared. We find that this change has no potential for discrimination.

We are careful to acknowledge that changes in election dates or designations of dates for special elections may well be covered under § 5. *See Hampton County Election Comm'n,* 470 U.S. at 178-79, 105 S.Ct. at 1135-36; 28 C.F.R. § 51.17(b). However, such changes are subject to preclearance only if they have the "potential for discrimination." Thus in *Hampton County Election Comm'n*, the Supreme Court required preclearance of the scheduling of a March election where the Attorney General had approved a plan calling for a November election, because it found that this change, coupled with the retention of an August candidate filing deadline, could possibly hinder voter participation and discourage potential candidates.[13] *Id.* at 177-79, 105 S.Ct. at 1135. *See also Garcia v. Guerra,* 744 F.2d 1159, 1165 (5th Cir. 1984) (change from April to August election date had potential to harm Hispanic voters, many of whom were migrant workers who left stated from late April until September each year), *cert. denied,* 471 U.S. 1065, 105 S.Ct. 2139 (1985). In contrast, there is no indication whatsoever that the "voters" in this case (elected black committee members and those black Democrats they represent) or the "candidates" (blacks who desire to be appointed to the committee) will in any way be disadvantaged if

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[13]The Court found that "an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November." *Id.* at 178, 105 S.Ct. at 1135. The Court also noted that by "extending the gap between the filing period and the election," the change in the election date also could "possibly prevent relative latecomers from entering the race." *Id.*

such additional selections are made at a special meeting held on a new date, as opposed to if they had been made at the August 1990 organizational meeting.[14]

III.

We therefore conclude that the convening of a special meeting of the state committee's black caucus to select additional members does not constitute a change in voting that has the potential for discrimination, despite the fact that the committee's new selection plan was precleared for implementation at an organizational meeting which has already occurred.

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court, that the motion for clarification filed by the defendant State Democratic Executive Committee on October 12, 1990, be and it is hereby granted, to the extent that the state committee may now implement the new plan for selecting additional black members that was precleared by the Attorney General on October 5, 1990.

DONE, this the 21st day of December, 1990.

/s/ Frank M. Johnson, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

---

[14]In contrast to the circumstances in *Hampton County Election Comm'n*, there is no filing requirement for blacks who wish to be selected as additional members of the committee. Moreover, the date change in this case does not appear to pose a risk of diminished voter participation because the relevant "voters" are elected black members of the committee whose willingness to attend a special meeting plaintiffs do not question.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated,	)	Filed Jan. 17, 1991
Plaintiffs,	)	CASE NO.
v.	)	CA-89-T-381-S (3-Judge Court)
JOHN BAKER, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA; J. HOLT ETHERIDGE, Chairman of the Henry County Democratic Executive Committee, HENRY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, as a committee and all-county Democratic executive committees similarly; and DEMOCRATIC PARTY OF THE UNITED STATES,	)	
Defendants.	)	

NOTICE OF APPEAL

Defendants, by undersigned counsel, hereby appeal to the United States Supreme Court from the Final Judgment entered December 21, 1990, by the three-judge panel of this Court in this proceeding

under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). This appeal is taken pursuant to 28 U.S.C. § 1973(c).

Respectfully submitted,

/s/ Fournier J. Gale III
FOURNIER J. GALE III

/s/ Gregory H. Hawley
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing motion has been served upon the following listed persons by placing a copy of same in the United States mail, postage prepaid and properly addressed, this the 16th day of January, 1991.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated,	)	Filed Sep. 7, 1990
Plaintiffs,	)	CASE NO.
v.	)	CA-89-T-381-S (3-Judge Court)
JOHN BAKER, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA; J. HOLT ETHERIDGE, Chairman of the Henry County Democratic Executive Committee, HENRY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, as a committee and all-county Democratic executive committees similarly; and DEMOCRATIC PARTY OF THE UNITED STATES,	)	
Defendants.	)	

NOTICE OF APPEAL

Defendants, by undersigned counsel, hereby appeal to the United States Supreme Court from the Final Judgment entered August 20, 1990, by the three-judge panel of this Court in this proceeding

under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). This appeal is taken pursuant to 28 U.S.C. § 1973(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Appeal has been served upon the following listed persons by placing a copy of same in the United States mail, postage prepaid and properly addressed, this the 6th day of September, 1990.

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/s/ Cynthia G. Lamar
OF COUNSEL

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. 1973c

Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, preprequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has

affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

U.S. Department of Justice
Civil Rights Division

April 13, 1984

Mr. Albert W. LaPierre
Executive Director
State Democratic Executive
Committee
306 Jefferson Federal Building
Birmingham, Alabama 35203

Dear Mr. LaPierre:

This refers to the selection of delegates to the 1984 Democratic National Convention in Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on February 13, 1984.

It is not at all clear that the internal party changes submitted are covered under Section 5 of the Voting Rights Act. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.7). In any event, our review of the plan indicates that it does not have a racially discriminatory purpose or effect. The fact that approximately 40 percent of the delegates selected were black evidences that minorities, rather than being excluded from this process of selecting a Democratic presidential candidate, had and will continue to have an active role in it. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the submitted changes. (28 C.F.R. 51.48).

Sincerely,

/s/ Wm. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

No. 90-1244

Supreme Court, U.S.
FILED
FEB 27 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1990

THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA,

Appellant,

v.

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated, and ANDRE KEITH, et al., as Intervenor,

Appellees.

Appeal From The Three-Judge District Court In The Middle District Of Alabama

MOTION OF APPELLEES HAWTHORNE AND NEWMAN TO AFFIRM OR DISMISS

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March 1991

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QUESTIONS PRESENTED

Does Section 5 of the Voting Rights Act of 1965, 42 USC § 1973c, apply to changes in the method of selecting members of the governing body of a statutorily authorized state political party?

Does the application of Section 5 of the Voting Rights Act to the method of selecting members of the governing body of a statutorily authorized state political party contravene the First Amendment to the Constitution of the United States?

Does Section 5 of the Voting Rights Act apply to an affirmative action plan of a state political party by which blacks are appointed to the party's governing body after all other members of the governing body, black and white, are elected in the party's primary?

LIST OF PARTIES

The parties in the court below were as follows: Thomas Hawthorne and Emory Newman, individually and on behalf of all other persons similarly situated; Jack Hurley, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; State Democratic Executive Committee of Alabama; J. Holt Etheridge, Chairman of the Henry County Democratic Executive Committee; Henry County Democratic Executive Committee, as a committee and for all county Democratic executive committees similarly situated; the Autauga County Democratic Executive Committee; the Dallas County Democratic Executive Committee; and Democratic Party of the United States; and Andre Keith, for himself and all others similarly situated.

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No. 90-1244

In The

Supreme Court of the United States

October Term 1990

THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA,

Appellant,

v.

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated, and ANDRE KEITH, et al., as Intervenor,

Appellees.

Appeal From The Three-Judge District Court In The Middle District Of Alabama

MOTION OF APPELLEES HAWTHORNE AND NEWMAN TO AFFIRM OR DISMISS

Appellees Thomas Hawthorne and Emory Newman, individually and on behalf of all other persons similarly situated, move this Honorable Court to dismiss or affirm the judgment of the United States District Court for the Middle District of Alabama on the grounds set out below in this motion.

OPINIONS BELOW

The order of the three-judge panel entered on 20 August 1990 is reported as *Hawthorne v Baker*, 750 FSupp 1090 (MD Ala 1990) (3-judge court); it is also reproduced in the Jurisdictional Statement beginning at A-1.

The orders of the Court entered on 12 September 1990 and 21 December 1990 are reproduced in the Jurisdictional Statement beginning at A-17 and A-18, respectively.

STATEMENT OF THE FACTS AND PROCEEDINGS

This appeal arises from a motion for an injunction under Section 5 of the Voting Rights Act. The motion was filed in an existing suit attacking (under Section 2 of the same Act) the racially discriminatory procedures used by the Alabama Democratic Party to elect its central committee (the State Democratic Executive Committee). The Section 2 suit is still pending.

The appellees filed their original complaint on 17 April 1989, claiming that a new rule ("Drake I") of the State Democratic Executive Committee (hereafter the "SDEC") and the prior rules unlawfully diluted the voting strength of black voters who were Democrats. The SDEC submitted Drake I for preclearance, and the Attorney General objected to it in December 1989.

On the Saturday before trial began in January 1990, the SDEC adopted a revised rule ("Drake II"). Trial proceeded with testimony about the effect of the pre-April 1989 rules, Drake I, and Drake II. Drake II established a

three-step process for choosing members of the state committee. First, 210 members of the committee are elected in the primary. Second, the relative number of black and white voters in the primary is used to determine if blacks are underrepresented among the 210 members. Third, the blacks elected among the 210 pick any additional black members necessary.[1]

The appellant SDEC submitted Drake II for preclearance by the Attorney General on 9 March 1990. JS at 4.[2] The Hawthorne appellees filed a motion in their pending case to have the implementation of the new rule enjoined unless and until it was precleared under Section 5 by the Attorney General or the United States District Court for the District of Columbia.[3]

---

[1] The appellees' Section 2 suit attacks this procedure and asks the Court to strike down the present system of malapportioned districts, which causes the underrepresentation of blacks among the 210 members elected in the primary.

[2] The SDEC claims that "the impetus for Drake II came from the ANSC to ensure that black representation on the SDEC fairly represented both organizations" – that is, the Alabama Democratic Conference and the Alabama New South Coalition, a non-partisan group. JS 4 at n. 5. This point is in dispute in the Section 2 proceeding, but has no practical significance in this appeal.

[3] Of particular concern to the Hawthorne appellees was the inclusion of the "loser eligibility" provision (referred to by the SDEC as the "qualification requirement"). Under this provision, to be eligible to run in the second round for the additional seats, a black candidate had to run for a first-round seat and lose. When the SDEC opened the qualification period for all seats in early March, the Hawthorne appellees were concerned that many black candidates would be encouraged to

(Continued on following page)

On 5 June 1990 – before Drake II had been precleared – the Democratic Party held its party primary, at which it elected 210 members of the State Committee. Under the provisions of Drake II, the turnout in this primary would be used to determine whether blacks were entitled to any additional seats and, if so, how many.

On 20 August 1990 the three-judge district court "enjoin[ed] enforcement of the new plan [Drake II] unless and until it is precleared." JS at A-11.

On 5 October 1990 the Attorney General precleared Drake II (as modified by the SDEC on 24 July).

REASONS THE MOTIONS SHOULD BE GRANTED

I. The appeal should be dismissed as moot because no decision of this Court will make any change in the status of the parties.

The SDEC's claim as to the August order is moot. The district court only ordered the SDEC not to enforce Drake

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(Continued from previous page)

run for the SDEC with the result that the black vote in racially mixed districts might be so fragmented as to frustrate the will of the black voters of the district. Since the Drake II amendment had not been precleared, the Hawthorne appellees were concerned that black candidates would be confused about whether they should run in order to preserve their chance for the second round.

While the district court never took any action to ameliorate this situation, the SDEC did notify the Attorney General on 24 July 1990 that it would not enforce the "loser eligibility" provision and modified its submission to reflect this fact.

II until it was precleared. At that time the SDEC had already submitted Drake II for preclearance, and later it was precleared. There would be no change in the status of the parties if the Supreme Court overruled the district court. The SDEC has pointed to no action that it was forced to take by the district court order that it would now undo if the district court were reversed.[4]

In effect, the SDEC is asking for an advisory ruling that it does not have to submit some of its future rule changes to the Attorney General.

II. The SDEC cannot appeal from the 21 December order because it prevailed.

The SDEC received a favorable decision from the three-judge court on its Motion for Clarification.[5] The SDEC has not explained what error it contends the district court committed in the December order or how that it would benefit if this Court reversed that order.

The SDEC cites 42 USC § 1973c as the basis of this Court's jurisdiction. JS at 2 n. 2. That statute provides in

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[4] "Counsel for the state committee informed this court at oral argument that its new plan [Drake II] has yet to be implemented in full and that the status quo is effectively still the 1983 plan." JS at A-11.

[5] "Accordingly, it is the order, judgment, and decree of the court, that the motion for clarification filed by the defendant State Democratic Executive Committee on October 12, 1990, be and it is hereby granted, to the extent that the state committee may now implement the new plan for selecting additional black members that was precleared by the Attorney General on October 5, 1990." JS at A-24.

pertinent part, "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court." This Court has indicated that this provision is an analog of 28 USC § 1253. *Allen v State Board of Elections*, 393 US 544, 560-63 (1969).

Under 28 USC § 1253 the winning party may not appeal from its victory. *Perez v Ledesma*, 401 US 82, 87 n. 3 (1971). Thus, there is no jurisdiction over the appeal from the 17 December order.

III. The 17 January 1991 notice of appeal cannot properly apply to the injunction entered on 20 August 1990.

The Section 5 proceedings were conducted as a part of the original case, under the same case number, but before a three-judge court.

The three-judge district court entered an injunction on 20 August 1990. The SDEC filed a motion for clarification on 5 October 1990. The motion for clarification did not ask the Court to change any of the relief it had granted the appellees, but asked the district court whether it might apply Drake II retroactively in light of the 20 August order and the subsequent preclearance of Drake II by the Attorney General. The motion for clarification (without the attached preclearance letter) is reproduced beginning at A-7.

The motion for clarification asked, in effect, "Does the injunction prevent us from enforcing Drake II retroactively now that we have received preclearance?" The

motion for clarification was not a motion for a new trial or a motion to alter or amend the judgment, each of which would have to be filed within 10 days of the judgment. F.R.Civ.P. 59(b) and (e). The motion for clarification was most nearly analogous to a motion for relief from a judgment on grounds that the judgment had been satisfied by the preclearance of Drake II. F.R.Civ.P. 60(b)(5).

Under 28 USC § 2101, the SDEC would have had 60 days to file its notice of appeal – that is, until 19 October – if the judgment was final and 30 days to file if the judgment was interlocutory.[6] An appeal filed on 17 January 1991 would be untimely in either case.

The injunction issued on 20 August is not a final judgment because it did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Catlin v United States*, 324 US 229 (1945). The injunction of 20 August settled only one issue against one defendant, leaving the larger Section 2 question still to be decided against all the defendants and the relief as to the county Democratic executive committees to be determined. In such a situation, the SDEC had a 30-day window of opportunity to file an appeal from the *injunction* of 20 August; otherwise, it must wait until there is a final judgment against it in the Section 2 case, or until the three-judge court enters a final judgment under F.R.Civ.P. 54(b).

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[6] See also, Supreme Court Rule 18.1 which sets a 30-day limit.

IV. The appeal should be dismissed because the appellants failed to file their Jurisdictional Statement within the time allowed by the Rules of the Court after their appeal of 7 September 1990.

On 20 August 1990 the three-judge district court "enjoin[ed] enforcement of the new plan [Drake II] unless and until it is precleared." JS at A-11. The three-judge court entered an order only, not a separate judgment. The injunction required the SDEC to refrain from enforcing Drake II until it had been precleared. The SDEC filed its notice of appeal from that injunction on 7 September 1990. Under Supreme Court Rule 18.3, the SDEC was required to file a jurisdictional statement within 60 days, that is, by 6 November. It did not file its Jurisdictional Statement until 31 January 1991 – 86 days after the deadline. Nor did it obtain from this Court an enlargement of time for the filing of the jurisdictional statement.

The appellant states it failed to file the Jurisdictional Statement on time "upon advice of the Office of the Clerk of the U.S. Supreme Court." JS at 2. While the Jurisdictional Statement does not explain this statement, one of the SDEC's attorneys has stated to the district court that she received advice from a deputy clerk at the Supreme Court that a motion for clarification makes a final order non-final.[7] Later, this advice was amended to state that the motion for clarification only tolls the time for filing the notice of appeal, not the Jurisdictional Statement.[8] While the appellees were not privy to the conversations

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[7] Affidavit of Cynthia G. Lamar, 4 and 5. The Lamar Affidavit is reproduced beginning at A-1.

[8] Lamar Aff. ¶ 7.

Ms. Lamar describes, we believe that the most reasonable explanation was that she neglected to inform the clerk that the Motion for Clarification was not filed within ten days of the 20 August order. The SDEC admitted to the district court that its 5 October Motion for Clarification does not affect the time for filing the Jurisdictional Statement.[9]

Whether the order of 20 August is "final" or "non-final" is immaterial to this portion of the motion to dismiss. The SDEC could take an appeal from the 20 August order because it was "an order granting . . . , after notice and hearing, . . . [a] permanent injunction in [a] civil action, suit or proceeding required by [an] Act of Congress to be heard and determined by a district court of three judges," 28 USC § 1253.

Since the SDEC did take an appeal from the 20 August order, the Rules of this Court provide that it must file a timely Jurisdictional Statement or suffer a dismissal. Rule 18.5 of the Supreme Court. This Court should not allow the SDEC the luxury of dragging out the filing of the Jurisdictional Statement several months beyond the time allowed by the Rules.

V. The decision below should be affirmed because there are no substantial issues presented for review.

A. Drake II affects the right to vote and is covered by Section 5 of the Voting Rights Act.

Under Drake II, the Democratic primary serves several functions with regard to the selection of members of

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[9] Lamar Aff. ¶ 7.

the State Democratic Executive Committee. First, 210 members of the committee are elected in the primary. Second, the relative number of black and white voters in the primary is used to determine if blacks are underrepresented among the 210 members. Third, the blacks elected among the 210 pick any additional black members necessary.

A plan which combines members chosen in a primary with those elected by the popularly-elected members must be precleared. The plan affects the right to vote in the following ways: (1) the power of the 210 members is affected by the number of the additional members; (2) the number of the additional members is a direct result of the number of voters of each race who vote in the Democratic primary and the number of members of each race elected among the 210; (3) the primary chooses those who will elect the additional members; and (4) fair representation can only be judged by analyzing all the members of the committee, not just the popularly-elected members.

B. The SDEC has no First Amendment right to discriminate on the basis of race.

Section 5 does not dictate how the SDEC must associate with other Democrats or choose its members except that it prohibits a plan which denies or abridges the right to vote on account of race.

The SDEC's contention that internal Democratic Party affairs do not relate to the electoral process is fundamentally wrong. The appellees did not ask the district court to tell the Democratic Party that it must associate or not associate with particular persons, or endorse or

not endorse particular policies. Rather, all the appellees sought in this action was a review by the Attorney General to ensure that black Democrats were not being deprived of fair representation – so they are able to participate in internal party policy and operational decisions. Such a claim implicates only Fifteenth Amendment voting rights and leaves the Democrats' First Amendment associational rights in the political process undisturbed.

CONCLUSION

For the reasons set out above, this appeal should be dismissed or affirmed.

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APPENDIX

IN THE UNITED STATED DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
v.	)	
JOHN BAKER, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA; J. HOLT ETHERIDGE, Chairman of the Henry County Democratic Executive Committee, HENRY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, as a committee and all county Democratic executive committees similarly; and DEMOCRATIC PARTY OF THE UNITED STATES,	)	CIVIL ACTION NO. CA 89-T-381-S
Defendants.	)	

AFFIDAVIT

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

Before me, the undersigned, appeared Cynthia G. Lamar, the Affiant, and testified under oath the following:

1. On September 7, 1990, defendant SDEC filed a Notice of Appeal in this Honorable Court noting its appeal to the Supreme Court of the United States of this Court's August 20, 1990 order.

2. In early October, 1990, in a telephone conference in which all parties were represented, the Honorable Myron Thompson requested of defendants that they file a Motion for Clarification to address certain ambiguities and/or unresolved issues regarding the application and effect of this Court's August 20, 1990 order.

3. On October 12, 1990, counsel for defendants filed a Motion for Clarification pursuant to the Court's request.

4. After filing the Motion for Clarification, I questioned whether the filing of the Motion for Clarification rendered this Court's order of August 20, 1990 no longer a final order that was properly appealable. Having received no ruling on the Motion for Clarification in early November and desiring to ensure that the August 20, 1990 order indeed was not final until such a ruling was received, I called the Clerk's office of the Supreme Court of the United States. A deputy clerk whose name I did not record assured me that a Motion for Clarification indeed rendered an otherwise final order nonfinal and tolled the time for filing the jurisdictional statement. I was told that no pleading need be filed with the Supreme Court regarding the tolling of the time for filing the jurisdictional statement.

5. On November 7, 1990, having received no ruling on the Motion for Clarification, I called the Clerk's office of the Supreme Court and inquired again whether there

was any pleading or informal document that Appellant SDEC could file with the Supreme Court to signify that the appeal had not been abandoned but rather that Appellant was awaiting the final order of the District Court. After speaking with several employees of the Clerk's office who assured me that no pleading need be filed, I was transferred to a Mr. Larson who stated the following: (1) under *Communist Party of Indiana v. Wit-comb*, 94 S.Ct. 656 (1974), the Motion for Clarification automatically tolled the time for filing the jurisdictional statement; (2) as an exercise of caution, and to clarify the written record, it could not hurt to file a Motion for Extension of Time stating that the District Court had suggested that Appellant file a Motion for Clarification with copies of the motion and the now interlocutory order of the District Court attached; (3) the Motion for Extension of Time, although not a requirement, would clarify for any person reviewing the file that the time for filing the jurisdictional statement had been tolled.

6. I prepared the Motion for Extension of Time as instructed by Mr. Larson and filed it November 9, 1990.

7. On November 19, 1990, I received a letter from the Supreme Court Clerk's office over the signature of Suzy McDivitt informing me that our Motion for Extension of Time could not be granted because it was untimely. I immediately telephoned Ms. McDivitt who transferred me to Mr. Larson. Mr. Larson told me that, contrary to our November 9 conversation, while the appeal itself was tolled by the filing of a Motion for Clarification, the time for filing a Motion for Extension of Time had not been tolled by the filing of the Motion for

Clarification and that thus, since the Motion for Extension of Time had been received by the Court more than sixty days after the filing of the Notice of Appeal, the Motion for Extension of Time was untimely and could not be granted.

8. In this same conversation on the 19th of November, I asked Mr. Larson whether the fact that the Motion for Extension of Time could not be granted meant that the jurisdictional statement was now past due. Mr. Larson responded that the jurisdictional statement could not be due until there was a final order in the case but that nevertheless, no Motion for Extension could be granted preserving Appellant's position for the record.

9. I expressed to Mr. Larson that it seemed that Appellant was in a catch-22 situation because if Appellant filed immediately its jurisdictional statement in response to the denial of the Motion for Extension of Time, it would appear to be abandoning its position that the Motion for Clarification rendered the August 20 order nonfinal and tolled the time for appeal. On the other hand, if Appellant awaited the District Court's ruling on the Motion for Clarification, Appellee might file a Motion to Dismiss the appeal. Mr. Larson assured me that the appeal itself was timely because the Notice of Appeal had been filed within 30 days in accordance with Rule 18 of the Rules of the Supreme Court of the United States, and suggested that I await the District Court's ruling on the Motion for Clarification so that the jurisdictional statement would encompass the District Court's order in final form. Mr. Larson also reminded me that while the timely filing of a Notice of Appeal is a statutory requirement for an appeal to the Supreme Court, the sixty day rule for the

filing of a jurisdictional statement is a rule of Court and not jurisdictional.

9. Also in this conversation of November 19, I asked Mr. Larson whether it would be acceptable for Appellant SDEC to file another Notice of Appeal when the Motion for Clarification was ruled upon to ensure that one or the other of the appeals was timely, whether or not the District Court agreed with Appellant that the Motion for Clarification rendered the August 20 order nonfinal. Mr. Larson responded that the August 20 order was indeed nonfinal, but that he understood Appellant's predicament and that there would be nothing wrong with filing another Notice of Appeal after the Motion for Clarification was ruled upon. Mr. Larson stated that he had never faced a similar situation and would not express an opinion whether Appellant should file a jurisdictional statement in each appeal once the Motion for Clarification had been ruled upon or whether Appellant should simply file one jurisdictional statement along with a Motion to Consolidate.

10. On November 19, 1990, Appellees filed a Motion to Dismiss the appeal in this Court.

11. On November 26, 1990, the SDEC forwarded to the chambers of the Honorable Myron Thompson a copy of its Motion for Extension of Time to the Supreme Court which stated SDEC's position that the appeal had been tolled by the Motion for Clarification.

12. On December 21, 1990, this Court ruled on the Motion for Clarification. Now that there is a final order in the case, counsel to the SDEC intend to file a jurisdictional statement in the September 7 appeal addressing

this Court's order in final form. We also intend to file another timely Notice of Appeal and the same jurisdictional statement therewith, along with a motion to the Supreme Court requesting in the alternative that the appeals be consolidated, considered separately or that one or the other be dismissed for the sake of judicial economy. In my opinion, these intended actions are in accordance with the instructions I received from the Supreme Court Clerk's office.

Further the Affiant saith not.

/s/ Cynthia G. Lamar
CYNTHIA G. LAMAR,
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS 4th DAY OF January, 1991.

/s/ Susan C. Williams
Notary Public

My Commission
Expires: 5/1/93

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS HAWTHORNE and EMORY NEWMAN, individually and on behalf of all other persons similarly situated, Plaintiffs, v. JOHN BAKER, in his official capacity as Chairman of the State Democratic Executive Committee of Alabama; STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA; J. HOLT ETHERIDGE, Chairman of the Henry County Democratic Executive Committee, HENRY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, as a committee and all county Democratic executive committees similarly situated; and DEMOCRATIC PARTY OF THE UNITED STATES, Defendants.	*	CA 89-T-381-S (3-Judge Court) [Filed 12 Oct 1990]

MOTION FOR CLARIFICATION

COMES NOW defendant the State Democratic Executive Committee (SDEC) and requests the Court to enter an order clarifying its August 20, 1990, order "enjoining enforcement of the new plan unless and until it is precleared." *See* order at 16. For grounds, defendant shows as follows:

(1) On October 5, 1990, the United States Department of Justice precleared the SDEC's submission of the Figures Amendment "with respect to implementation for the 1990-1994 term of the SDEC." *See* preclearance letter at 2 (attached as Exhibit A).

(2) On October 10, 1990, the SDEC filed notice of preclearance with this Court and requested the Court to issue an order lifting the Court's injunction against enforcement of the Figures Amendment pursuant to its August 20, 1990, order enjoining enforcement "unless and until [the new plan] is precleared."

(3) The SDEC takes the position that it should now be permitted to organize forthwith for the 1990-1994 term of the SDEC under the terms of the Figures Amendment.

(4) However, in the conference call held October 12, 1990, plaintiffs' lawyer argued that because the Figures Amendment has a date for implementation that has already passed ("at the organizational meeting in 1990, the minority caucus shall meet two hours before . . . ," *see* Exhibit B), the amendment cannot be implemented at all during the 1990-1994 term of the SDEC and, therefore, the 23 add-on members selected this year by the ADC should serve (subject to the Court's Section 2 decision). The SDEC's implementation of the amendment using *different* dates, according to Mr. Blacksher, would be a new change requiring preclearance. Although Mr. Seay was not prepared at the time of the conference call to make a statement on behalf of the Keith intervenors, this pleading assumes that he would take a position similar to that of Mr. Blacksher.

(5) Defendant submits that plaintiffs' lawyer's position cannot be maintained consistently with his suggestion in the conference call that plaintiffs' motion to amend to conform to the evidence, which would have attacked the use in 1990 of the rule allowing all add-ons to be selected only by the ADC, is now moot. Nor is his position consistent with plaintiffs' motion to amend itself (which claims that said rule "denies a segment of the black Democratic electorate an effective, equal opportunity to be elected to an add-ons seat"), or with plaintiffs' lawyers' representation of the plaintiff class, not just the ADC.

(6) Defendant further submits that it is not uncommon for a provision or act that actually receives preclearance *after* the effective date specified in its text nevertheless to become effective in substance on the preclearance date (e.g., the Fair Campaign Practices Act).

(7) Finally, defendant submits that this Court has ample equitable discretion, in its formulation of a complete remedy in the Section 5 proceeding, to order the SDEC to waive the requirement that add-on seats for the 1990-94 term be filled two hours before the SDEC's 1990 organizational meeting, or to make appointments retroactive to that time. To deprive all elected black caucus members of the opportunity to participate in selecting the add-on members for the 1990-94 term would render the Justice Department's preclearance meaningless and deny equity to black voters.

Accordingly, the SDEC respectfully requests this Court to enter an order clarifying its order of August 20, 1990, to indicate that the SDEC is now authorized to

convene a meeting of its black caucus, as that term is used in the Figures Amendment, to select and seat add-on members for the 1990-94 term and conduct other business as provided under the amendment. Defendant respectfully requests that the Court's order make clear that the requirement that this meeting take place two hours before the SDEC's organizational meeting in 1990 is thereby waived.

Respectfully submitted this the 12th day of October, 1990.

/s/ Susan E. Russ
Susan E. Russ

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